Supreme Court, U.S.
FILED
MAR 3 1999
CLERK

NO. 98-1224

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1998

IN RE
MEDICAL REVIEW PANEL
FOR
THE CLAIM OF CLARENCE BROWN
and
GAIL O'CONNOR BROWN, *Petitioners*

On Petition for a Writ of Certiorari to the
Supreme Court of the State of Louisiana

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

RICHARD P. IEYOUB
ATTORNEY GENERAL OF LOUISIANA

J. ELLIOTT BAKER
Assistant Attorney General
601 Poydras Street, Suite 1725
New Orleans, Louisiana 70130
Telephone: (504) 599-1200
Counsel for Respondent, State of Louisiana
through The Medical Center of Louisiana
at New Orleans, et. al.

PARTIES TO THE PROCEEDINGS BELOW

Petitioners, Clarence Brown and Gail O'Connor Brown, in their own right and on behalf of their minor child, Crystal Brown, were claimants/plaintiffs in the Civil District Court for the Parish of Orleans, regarding a claim before the State Medical Review Panel.

The defendants named in the claim before the State Medical Review Panel were Charity Hospital and Medical Center of Louisiana at New Orleans, Dr. "A", and Dr. "B". Charity Hospital is part of the Medical Center of Louisiana at New Orleans.

TABLE OF CONTENTS

Page

Parties to the Proceeding Below i

Table of Contents ii

Table of Authorities iii

Statement Of The Case In Addition To That Contained In The Petition For A Writ Of Certiorari 1

Summary of Argument 2

Argument 4

I. This Court Should Not Exercise Its Jurisdiction Because The Petition For A Writ Of Certiorari Does Not Present A Substantial Federal Question 4

II. The Petitioners' Federal Constitutional Claims Are Not Properly Before This Court Because They Were Not Adequately Presented To The State Courts 5

A. The Petitioners' Federal Constitutional Claims Were Not Adequately Presented To The State Courts --- Some Of The Federal Constitutional Claims Were Not Raised In The State Courts At All And Other Federal Constitutional Claims Were Not Raised In Either The Trial Court Or The Court Of Appeal 7

B. The Petitioners Could Have Presented Their Federal Constitutional Claims At The State Trial Court Level, Just As They Presented Their State Constitutional Claims 9

III. Even If Properly Raised In The State Court System, This Constitutional Challenge Does Not Warrant A Remand 11

A. La. R.S. 9:5628 Does Not Discriminate On The Basis of Physical Condition Or Minority 11

B. Even If This Honorable Court Were Of The Opinion That The Instant Statute Classifies On The Basis Of Physical Condition Or Minority, A Remand Would Not Be Warranted Given The Minimal Scrutiny Involved 14

Conclusion 25

Appendices

State's Exception of Prescription and Memorandum in Support of Exception of Prescription ..... Appendix A

Plaintiff's Opposition to Exception of Prescription and Memorandum in Opposition to Exception of Prescription ..... Appendix B

Plaintiff's Supplemental Memorandum in Opposition to Exception of Prescription ..... Appendix C

State's Supplemental Memorandum in Support of Defendants' Exception of Prescription ..... Appendix D

Judgment of the Civil District Court for the Parish of Orleans, entered June 23, 1997, granting Respondent's Exception of Prescription ..... Appendix E

Opinion of the Louisiana Court of Appeal, Fourth Circuit, entered July 1, 1998, Affirming the Judgment of the Civil District Court ..... Appendix F

TABLE OF AUTHORITIES

Constitutional Provisions

United States Constitution ..... passim

La. Const. art. I, § 3 8

Statutes

La. R.S. 9:5628 ..... passim

La. R.S. 40:1299.41 et seq. 20

Jurisprudence

Branch v. Willis-Knighton Medical Center, 92-3086 (La. 4/28/94), 636 So. 2d 211 20

Brubaker v. Cavanaugh, 741 F.2d 318 (10th Cir. 1984) 22

Butler v. Flint Goodrich Hospital, 607 So. 2d 517 (La. 1992), cert den., 508 U.S. 909, 113 S.Ct. 2338, 124 L.Ed.2d 249 (1993) 20

City of Cleburne, Texas v. Cleburne Living Center, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) ... 16

Crier v. Whitecloud, 496 So.2d 305 (La. 1986) 3, 6, 10

Douglass v. Stallings, 870 F.2d 1242 (7th Cir. 1989) 22

Fein v. Permanente Medical Group, 474 U.S. 892,
106 S.Ct. 214, 88 L.Ed.2d 215 (1985)..... 4

Flemming v. Nestor, 363 U.S. 603, 80 S.Ct. 1367,
4 L.Ed.2d 1435 (1960)..... 17

Frontiero v. Richardson, 411 U.S. 677, 93 S.Ct. 1764,
36 L.Ed.2d 583 (1973)..... 16

Guillory v. Avoyelles Railway Company, 104 La. 11,
28 So. 899 (1900)..... 14

Jewson v. Mayo Clinic, 691 F.2d 405 (8th Cir. 1982)..... 22

Martinez v. State of California, 444 U.S. 277,
100 S.Ct. 553, 62 L.Ed. 2d 481 (1980)..... 5, 15

Metropolitan Erection Company, Inc. v. Landis
Construction Co., Inc., 627 So.2d 144 (La. 1993)..... 14

Montagino v. Canale, 792 F.2d 554 (5th Cir. 1986)..... 20

Massachusetts Board of Retirement v. Murgia, 427 U.S. 307,
96 S.Ct. 2562, 49 L.Ed.2d 520 (1976)..... 17

Plyler v. Doe, 457 U.S. 202, 102 S.Ct. 2382,
72 L.Ed.2d 786 (1938)..... 24

San Antonio Independent School District v. Rodriguez,
411 U.S. 1, S.Ct. 1278, 36 L.Ed.2d 16 (1973)..... 16

Seoane v. Ortho Pharmaceuticals, Inc., 660 F.2d. 146
(5th Cir. 1981)..... 20

Succession of Pizzillo, 233 La. 328, 65 So.2d 783 (1953).. 14

Usery v. Turner Elkhorn Mining Co., 428 U.S. 1,
96 S.Ct. 2882, 49 L. Ed.2d 752 (1976)..... 22

Valentine v. Thomas, 433 So.2d 289 (La. App 1 Cir.),
writ den., 440 So.2d 728 (La. 1983)..... 21

Vance v. Bradley, 440 U.S. 93, 99 S.Ct. 939,
59 L.Ed.2d 171 (1979)..... 17

Webb v. Webb, 451 U.S. 493, 101 S.Ct. 1889,
68 L. Ed. 2d 392 (1981)..... 5

Whitnell v. Silverman, 95-0112 (La. 12/6/96),
686 So.2d 23..... 13

Williams v. The Louisiana Department of Health
and Hospitals, 95-0713 (La. 1/26/96), 671 So.2d 899..... 7

Other Authorities

50 Tul. L.Rev. 655 (1976)..... 19

53 Tul. L. Rev. 640 (1979)..... 19

STATEMENT OF THE CASE IN ADDITION TO THAT CONTAINED IN THE PETITION FOR WRIT OF CERTIORARI

On May 23, 1997, a hearing was held in the trial court on the Respondent's Exception of Prescription. At that hearing, the Petitioners had the opportunity to present argument as to the unconstitutionality of La. R.S. 9:5628. Indeed, the Petitioners had presented argument as to the unconstitutionality of that statute *vis a vis* the Louisiana Constitution in their Supplemental Memorandum in Opposition to Exception of Prescription (Appendix C). Therefore, the Petitioners had the opportunity in the trial court to dispute the rational basis of the instant statute.

SUMMARY OF ARGUMENT

Respondent respectfully submits that this Honorable Court should not exercise its jurisdiction in this matter, because the instant question of the constitutionality of La. R.S. 9:5628, a statute of repose applicable in medical malpractice actions, is not a substantial federal question. This Court has already indicated, in dismissing an appeal seeking the review of a decision by the California Supreme Court, that the question of the constitutionality of a limitation of recovery in tort by victims of medical malpractice is not a substantial federal question. Similarly, the question of the constitutionality of another tort law, the instant medical malpractice statute of repose, does not present a substantial federal question.

Respondent further submits that, in any event, the question of the constitutionality of the instant statute is not properly before this Honorable Court, because the federal constitutional questions were not raised adequately in the state court system. Specifically, the federal constitutional claims based on the Due Process guarantees of the Fourteenth Amendment and based on Crystal Brown's status as a minor were not presented to any state court. And, the Petitioners' claim that the instant statute discriminates on the basis of physical condition in violation of Equal Protection guarantees of the Fourteenth Amendment was presented for the first time to the Supreme Court of Louisiana and not to any other state courts. The record is clear that the Petitioners' federal constitutional claims could have been presented at the trial court level as required under Louisiana law, just as the Petitioners' state constitutional claims were first presented at the trial court level. Because the Petitioners failed to adequately raise their federal constitutional claims

in the state court system, their federal constitutional claims are improperly before this Court and should not be heard.

Finally, Respondent submits that the instant statute of repose is fully in conformity with the dictates of the Equal Protection and Due Process Clauses of the Fourteenth Amendment, because this law is based in reason and neither abridges a fundamental constitutional right nor creates a suspect or quasi-suspect classification. First, this Court has ruled that a State's interest in maintaining its own rules of tort is paramount to any discernible federal interest, except perhaps an interest in protecting the individual from state action that is wholly arbitrary or irrational. A fair inference of this ruling is that the right to bring a tort lawsuit is not a fundamental right under the United States Constitution. Therefore, any legislative enactment affecting that right need only have a rational basis.

Second, the instant statute does not create a suspect or quasi-suspect classification, or any classification based on physical condition or age at all. Instead, it applies equally to plaintiffs with latent conditions and those with non-latent conditions and to minors and majors. Therefore, no further equal protection scrutiny is required.

Even if this Honorable Court were to rule that the instant statute classifies on the basis of physical latency or minority, this Court has already ruled that laws affecting physically disabled persons do not constitute suspect or quasi-suspect classifications, and this Court has never ruled that laws affecting minors create suspect or quasi-suspect classifications. Furthermore, medical malpractice plaintiffs do not constitute a politically powerless minority entitled to heightened protection under the federal Equal Protection Clause. Their right to recovery in tort is vigilantly protected

during the political process that regulates it by the plaintiffs' bar which has a strong interest in protecting statutory rights of recovery in tort. Because the instant statute does not implicate a suspect or quasi-suspect class, it need only have a rational basis which it clearly does, as various federal Courts of Appeals have ruled.

Respondent respectfully requests that this Honorable Court deny the instant Petition for a Writ of Certiorari or rule that the instant statute is fully constitutional.

ARGUMENT

Petitioners have requested that this Honorable Court remand this case to the Louisiana trial court so that the Petitioners may present evidence to support their federal constitutional claims. Petitioners have challenged the constitutionality of La. R.S. 9:5628 as violative of Crystal Brown's equal protection and due process rights guaranteed under the United States Constitution insofar as the statute operated to perempt their causes of action before they could be detected and insofar as it has a disproportional impact on minors. Petition at 6. Respondent respectfully submits that plaintiffs' Petition for Writ of Certiorari should be denied for the following reasons.

I. This Court Should Not Exercise Its Jurisdiction Because The Petition For A Writ Of Certiorari Does Not Present A Substantial Federal Question.

This Honorable Court has previously dismissed an appeal of a case challenging, on federal Due Process and Equal Protection grounds, the constitutionality of state statute limiting the recovery of non-economic damages in medical malpractice actions. Fein v. Permanente Medical

Group, 474 U.S. 892, 106 S.Ct. 214, 88 L.Ed.2d 215 (1985). The reason given by this Court for the dismissal was that "The appeal is dismissed for want of a substantial federal question." Id. Clearly, behind this Honorable Court's ruling in Fein was this Court's recognition that a state's interest in maintaining its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual from State action that is wholly arbitrary or irrational. Martinez v. State of California, 444 U.S. 277, 282, 100 S.Ct. 553, 557, 62 L.Ed.2d 41 (1980).

The statute challenged in the instant case is a statute of repose requiring that any medical malpractice action be brought within three years of the health care provider's negligent act or omission. The instant statute of repose is part of Louisiana tort law, just as the statute in Fein v. Permanent Medical Group was a part of California tort law. Respondent respectfully suggests that, as in Fein v. Permanente Medical Group, the instant constitutional challenge does not the place before this Court a substantial federal question, and for that reason, the Petition should be denied.

II. The Petitioners' Federal Constitutional Claims Are Not Properly Before This Court Because They Were Not Adequately Presented To The State Courts.

This Honorable Court has been clear that the jurisdiction of this Court to reexamine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system. Webb v. Webb, 451 U.S. 493, 496-497, 101 S.Ct. 1889, 1891, 68 L. Ed. 2d 392 (1981). Such prior presentation to the state courts is warranted by the principle of comity and is also

proper in order to afford the parties the opportunity to develop a record necessary for adjudicating the issue and to permit the state courts to exercise their authority to construe state statutes so as to avoid or obviate federal constitutional challenges. Id. at 500, 101 S.Ct. at 1893, 1894. Thus, as this Honorable Court has stated:

> At the minimum, however, there should be no doubt from the record that a claim under a federal statute or the Federal Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law.

Id. at 501, 101 S.Ct. at 1894. Finally, this Court has also stated that:

> [w]hen "highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." [Citation omitted.]

Id. at 495, 101 S.Ct. at 1891.

In the instant case, the Supreme Court of Louisiana denied the Petitioners' Application for Writ of Review and thereby failed to pass upon the federal constitutional question presented therein. Under the reasoning of the Webb Court, it must be assumed that the Louisiana Supreme Court did not rule upon the federal question due to the want of proper presentation in the state courts. And, if the record as a whole

shows that the federal claim was not adequately presented, then this Honorable Court does not have jurisdiction to reexamine the instant judgment.

A. The Petitioners' Federal Constitutional Claims Were Not Adequately Presented To The State Courts --- Some Of The Federal Constitutional Claims Were Not Raised In The State Courts At All And Other Federal Constitutional Claims Were Not Raised In Either The Trial Court Or The Court Of Appeal.

Respondent respectfully submits that the record is clear that the federal claims were not adequately presented to the state courts in the manner required by the state law. The Supreme Court of Louisiana has recognized that an attack upon the constitutionality of the statute must first be presented in the trial court. Williams v. The Louisiana Department of Health and Hospitals, 95-0713 p. 4 (La. 1/26/96), 671 So.2d 899, 901. Additionally, the unconstitutionality of the statute must be specially pleaded and the grounds for the claim particularized. 95-0713 at 4, 671 So.2d at 901. Therefore, under Louisiana law a constitutional challenge must initially occur in the trial court and the basis of the challenge must be articulated. Respondent respectfully submits that the Petitioners failed to raise their federal claims in the trial court as required by state law.

It is undisputed that the plaintiffs presented no federal constitutional claim whatsoever to any Louisiana state court until they petitioned the Supreme Court of Louisiana to exercise its discretionary jurisdiction and review the

Judgments of the Trial Court and of the Court of Appeal.[1] Petition for Writ of Certiorari at 5 and Appendix D thereto, at D-8-9. In their Petition for Writ of Review to the Supreme Court of Louisiana, the petitioners raised their federal constitutional claims for the first time as follows:

> Crystal Brown is unfairly discriminated against in violation of the Louisiana Constitution, Art. 1, Section 3 and the United States Constitution on the basis of her physical condition and sex, which discrimination was undiscoverable by her until years after the malpractice and years after prescription had tolled under LSA-R.S. 9:5628.

Petition at D-8-9. Therefore, the record is clear that none of the federal claims was presented in the trial court as required by Louisiana law, and therefore none is properly before this Court.

Some of the federal claims the Petitioners raise to this Honorable Court were not presented to any state court at all. As the excerpt of their Louisiana Supreme Court Petition for Writ of Certiorari quoted above indicates, the only federal constitutional claims presented to the Louisiana Supreme Court alleged discrimination based on physical condition and sex. And, there were no constitutional claims presented to the Louisiana Supreme Court alleging discrimination against minors or alleging a violation of federal constitutional guarantees of due process. Therefore, the constitutional claims based on alleged due process violations and on

---

[1] These judgments maintained Respondent's Exception of Prescription and also rejected, either expressly or by clear implication, the Petitioners' constitutional challenges based on the Louisiana Constitution of 1974.

alleged discrimination against minors cannot possibly be properly before this Court, not having been presented in any manner to the state courts.

B. The Petitioners Could Have Presented Their Federal Constitutional Claims At The State Trial Court Level, Just At They Presented Their State Constitutional Claims.

The Petitioners attempt to justify not raising any federal constitutional challenges until this lawsuit reached the Supreme Court of Louisiana by arguing that "Louisiana procedural jurisprudence prohibits Crystal Brown from raising her federal constitutional claims at the trial court level." Petition at 6, 7-11, 22. Respondent respectfully submits that the record of the proceedings in the courts below belies Petitioners' statement that Crystal Brown was prohibited from raising her federal constitutional claims at the trial court level.

The Petitioners' state constitutional claims were litigated in the trial court. First, Respondent at no time during the proceedings in the trial court argued that the Petitioners had failed to adequately raise their state constitutional claims. Nor did the Petitioners address that issue. Instead, all parties presented argument as to the merits of the state constitutional challenge. See, Appendix C at C-2-9 and Appendix D at D-2-4.[2] Nor was any oral argument presented to the Trial Court that the state constitutional challenge had been inadequately raised.

---

[2] All documents relating to the litigation of Respondent's Exception of Prescription in the trial court are appended hereto as Appendices A,B,C, and D.

Second, the June 20, 1997 Judgment of the Trial Court granting respondent's Exception of Prescription simply states that the Judgment is entered "Considering the pleadings, arguments of counsel for reasons already assigned". See, Appendix at E-1. Clearly, since the parties argued the merits of the state constitutional challenge and presented no argument in the trial court that the constitutional issue had been improperly raised and since the judge granting the exception gave no indication that she considered the constitutional issue to be improperly raised, this Judgment is properly interpreted to reflect a rejection of the plaintiffs' state constitutional challenge on its merits. Respondent respectfully submits that since the Petitioners' state constitutional challenge was heard at the trial court level, any federal constitutional challenge made by the Petitioners would have been heard as well. Thus, the Petitioners' argument that they could not have raised their federal constitutional challenge in the state trial court is in error.

The conclusion that the trial court considered the merits of the Petitioners' state constitutional challenge is confirmed by the Opinion in this case of the Louisiana Court of Appeal, Fourth Circuit. The Court of Appeal addressed the merits of the Petitioners' state constitutional challenge. See Appendix F at F-9-14. It did not rule that the state constitutional challenge had not been properly raised in the trial court. Specifically, the Court of Appeal ruled that the issue of the constitutionality of La. R.S. 9:5628 *vis a vis* the Louisiana Constitution had already been decided by the Supreme Court of Louisiana in Crier v. Whitecloud, 496 So.2d 305 (La. 1986) and that "Crier dictates that the Browns' claim be dismissed under La. R.S. 9:5628." See Appendix F at F-10-11, F-13. Respondent respectfully submits that the Court of Appeal Opinion is further

indication that because the Petitioners' state constitutional claims were considered in the Trial Court and in the Court of Appeal, any federal constitutional claims would have been heard as well. Therefore, the Petitioners' argument that they could not have raised their federal constitutional claims at the trial court level is in error.

Based on all of the foregoing, Respondent submits that the record is clear that the Petitioners did not properly raise their federal constitutional claims within the state court system even though they were capable of doing so, just as they had raised their state constitutional claims. Respondent respectfully requests that this Honorable Court deny the instant Petition for a Writ of Certiorari.

III. Even If Properly Raised In The State Court System, This Constitutional Challenge Does Not Warrant A Remand.

A. La. R. S. 9:5628 Does Not Discriminate On The Basis of Physical Condition Or Minority.

The Petitioners have argued that this Honorable Court should remand this case to the trial court for a hearing on her federal constitutional claims, because according to the Petitioners, La. R.S. 9:5628 discriminates against Crystal Brown on the basis of her physical condition and on the basis of her minority. Petition at 6. Respondent respectfully submits that the instant statute in fact does not discriminate on the basis of physical condition or age, and thus a remand to the trial court for a hearing is inappropriate in this case.

The statute at issue in this case, La. R. S. 9:5628, provides:

> A. No action for damages for injury or death against any physician, chiropractor, nurse, licensed midwife practitioner, dentist, psychologist, optometrist, hospital duly licensed under the laws of this state, or community blood center or tissue bank as defined in R. S. 40:1299.41 (A), whether based upon tort, or breach of contract, or otherwise, arising out of patient care shall be brought unless filed within one year from the date of the alleged act, omission, or neglect, or within one year from the date of discovery of the alleged act, omission, or neglect; however, even as to claims filed within one year from the date of such discovery, in all events such claims shall be filed at the latest within a period of three years from the date of the alleged act, omission or neglect.
>
> B. The provisions of this Section shall apply to all persons whether or not infirm or under disability of any kind and including minors and interdicts.

The Petitioners have attempted to challenge the constitutionality of Section 5628 *vis a vis* Due Process and Equal Protection guarantees of the United States Constitution.

The instant statute does not discriminate on the basis of the physical condition or age of a plaintiff. Rather, it affects equally all persons who undergo medical treatment. Crier v. Whitecloud, 496 So.2d 305, 311 (La. 1986). It provides notice that malpractice claims will be barred if they

are not filed within three years from the date of the alleged act, omission or neglect. Therefore, the statute operates to bar the claims of any person who does not file his claim within the three year peremptive period, regardless of the reason that he did not file his claim during the three-year-period --- it does not single out those individuals with latent claims[3]. Instead, it simply creates the class of those who have filed their lawsuits within the three-year period and the class of those who have not filed their lawsuits within the three-year period. Because individuals whose injuries are latent are not singled out for disparate treatment, it is clear that the instant statute does not create a classification that disadvantages or discriminates against one class of individuals by reason of or because of their physical condition --- it is neutral.

It should be noted that in Whitnell v. Silverman, 95-0112 p. 8 (La. 12/6/96), 686 So.2d 23, 28-29, the statute operated to perempt the cause of action of Mrs. Whitnell, who suffered from a bladder cancer which exhibited symptoms throughout the three year peremptive period. Therefore, far from affecting only those individuals with latent illnesses, the instant statute has most recently been applied to a plaintiff with a non-latent illness.

In the same vein, La. R.S. 9:5628 does not classify according to age. One need only read the instant statute to recognize that it creates no classification whatsoever based on age. Indeed, Section 5628 is clear in providing at Subsection B that:

---

[3] Obviously, the latency of an illness is not the only reason an individual may fail to file a claim within three years of the alleged act or omission that gave rise to the claim. Instead, a claimant may fail to file his claim for political, social, philosophical, or simply personal reasons unrelated to whether the injury resulting from the alleged malpractice is latent.

> The provisions of this Section shall apply to all persons whether or not infirm or under disability of any kind and including minors and interdicts.

Because the statute applies equally to minors as well as majors, it simply does not discriminate on the basis of age.

Additionally, the courts have long recognized that the Legislature may determine that the public interest dictates that a claim be terminated after a particular time, without the possibility of suspension or interruption. Metropolitan Erection Company, Inc. v. Landis Construction Company, 627 So.2d 144, 147 (La. 1993); Succession of Pizzillo, 233 La. 328, 65 So.2d 783 (1953). Guillory v. Avoyelles Railway Company, 104 La. 11, 28 So. 899 (1901). Indeed, as recognized by the Crier v. Whitecloud Court, the Legislature has the sole discretion in fixing statutes of limitation and such a legislative determination does not constitute discrimination. Crier, 496 So.2d at 310-311.

Based on the foregoing, Respondent respectfully submits that Section 5628 does not discriminate on the basis of physical condition or minority, and therefore a remand to the trial court for a hearing on constitutionality is not warranted.

B. Even If This Honorable Court Were Of The Opinion That The Instant Statute Classifies On The Basis Of Physical Condition Or Minority, A Remand Would Not Be Warranted Given The Minimal Scrutiny Involved.

The Petitioners in this matter now claim that the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the United States Constitution, which was ratified by the People of Louisiana on July 9, 1868, prohibit this law.

Respondent respectfully submits that the rulings of this Honorable Court and of the lower federal courts are contrary to the Petitioners' position. Specifically, the federal jurisprudence is clear that state tort laws neither affect a fundamental constitutional right nor create a suspect or quasi-suspect classification, so such a law need only have a rational basis to survive federal equal protection and due process scrutiny. Further, the federal courts have ruled that the instant statutes of repose and other similar statutes of repose have a rational basis and are thus fully constitutional vis a vis Fourteenth Amendment Equal Protection and Due Process guarantees.

First, this Court has indicated that any right to recovery in tort is not a fundamental constitutional right requiring heightened scrutiny. This Court has stated that a state's interest in maintaining its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual from state action that is wholly arbitrary or irrational. Martinez v. State of California, 444 U.S. 277, 282, 100 S.Ct. 553, 557, 62 L.Ed. 2d 41 (1980). Based on that recognition, this Court ruled that a California statute immunizing public entities and employees from liability for injuries caused by paroled prisoners was constitutional as a reasonable exercise of the legislative power. 444 U.S. at 280, 283, 100 S.Ct. at 556, 558. Therefore, this Honorable Court has recognized that any constitutional right to recover in tort, if existent, is far from fundamental and must yield to the will of the People, as

expressed through the Legislature, unless the Legislature acts in a wholly arbitrary or irrational manner.

The ruling of the Martinez Court is entirely consistent with this Honorable Court's recognition that it is not the province of the Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 33, 93 S.Ct. 1278, 1297, 36 L.Ed.2d 16 (1973). Instead, it is the duty of this Court to assess the fundamentality of a right based on whether the right is explicitly or implicitly guaranteed by the United States Constitution. 411 U.S. at 33-34, 93 S.Ct. at 1297. Of course, this Honorable Court has never ruled that the United States Constitution explicitly or implicitly guarantees recovery in tort.

Second, this Court has ruled that physically disabled[4] persons do not constitute a suspect or quasi-suspect class. City of Cleburne, Texas v. Cleburne Living Center, 473 U.S. 432, 442, 105 S.Ct. 3249, 3255, 87 L.Ed.2d 313 (1985). In distinguishing between a classification based on sex, which it had previously found quasi-suspect, and a non-quasi-suspect classification such as one based on physical disability, the Cleburne Court stated:

> "[W]hat differentiates sex from such non-suspect statuses as intelligence or physical disability...is that the sex characteristic

---

[4] Latency of physical condition is not equivalent to physical disability. However, both exist as a result of physical condition. Respondent respectfully submits that if laws affecting the physically disabled do not create suspect or quasi-suspect classifications, then laws affecting those whose physical condition is latent do not create suspect or quasi-suspect classifications either.

> frequently bears no relation to ability to perform or contribute to society." Frontiero v. Richardson, 411 U.S. 677, 686, 93 S.Ct. 1764, 1770, 36 L.Ed.2d 583 (1973) (Plurality Opinion).

473 U.S. at 440-441 , 105 S.Ct. at 3254-3255. Furthermore, this Court has never ruled that legislation affecting minors should be subject to heightened scrutiny. Cleburne, 473 U.S. at 472 n. 24, 105 S.Ct. at 3271 n. 24 (Blackmun, J., concurring in part and dissenting in part). Therefore, classifications based on physical disability or minority are neither suspect or quasi-suspect.

The Cleburne Court further stated:

> The lesson of Murgia [Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976)] is that where individuals in the group affected by law have distinguishing characteristics relevant to interests the state has the authority to implement, the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interest should be pursued. In such cases, the Equal Protection Clause requires only a rational means to serve a legitimate end.

473 U.S. at 441-442, 105 S.Ct. at 3255. Clearly, any characteristics affected by the instant statute of repose are relevant to the state's interest in enacting statutes of repose.

Therefore, if the instant statute is to be subjected to scrutiny, it will be subjected to rational basis scrutiny.

This Court has held that a statute will survive rational basis scrutiny unless those challenging the legislative judgment convince the Court that the legislative facts upon which the statute is apparently based could not possibly be conceived to be true by the Legislators. Vance v. Bradley, 440 U.S. 93, 111, 99 S.Ct. 939, 949, 59 L.Ed.2d 171 (1979); Flemming v. Nestor, 363 U.S. 603, 611, 80 S.Ct. 1367, 1373, 4 L.Ed.2d 1435 (1960).

There is no doubt that the instant statute has a rational basis. The Supreme Court of Louisiana has recognized the Louisiana Legislature's reason for enacting the instant statute as follows:

> In the instant case, the legislature enacted La. R. S. 9:5628 in an attempt to alleviate a "medical malpractice insurance crisis." Malpractice claims were proliferating at the same time that the amounts of the damage awards were increasing rapidly. Premiums for malpractice insurance had skyrocketed, forcing doctors to pass increased costs onto patients and creating fears that many physicians would simply abandon the practice of medicine. The increased insurance costs were primarily blamed on the lengthy period in which malpractice claims could be filed. The decision by the legislature to limit malpractice actions against "physicians, chiropractors, dentists or hospitals" to those situations where the

> injury occurs within three years of the allegedly negligent treatment was intended to alleviate this situation.

496 So.2d at 309. More recently, the High Court of Louisiana has stated:

> The purpose of the statute is to check the increase in medical malpractice insurance premiums by restricting the volume and retrospective nature of medical malpractice litigation.
>
> During the 1970's the rising costs of medical malpractice insurance and the decreasing availability of such coverage gave rise to the perception of a "medical malpractice crisis" in certain states. Note, Constitutional Law -- Louisiana Medical Malpractice Review Panel Upheld Under Equal Protection Scrutiny, 53 Tul. L. Rev. 640, 641 (1979). In 1975, the legislatures of many states, prompted by the lobby of the American Medical Association and the malpractice insurance companies (AMA lobby), enacted significant changes in substantive and procedural laws governing the adjudication of medical malpractice claims. [Citation omitted.]
>
> Evidently, the AMA lobby considered the shortening and tightening of statutes of limitations affecting claims against physicians to be one of the most effective means of controlling the malpractice

> insurance crisis. Comment, Recent Medical Malpractice Legislation -- A First Checkup, 50 Tul. L.Rev. 655, 672 (1976).
>
> In Louisiana, in response to or in anticipation over a malpractice insurance crisis, the legislature in its 1975 regular session, adopted a series of laws limiting the rights of medical malpractice claimants [including La. R.S. 9:5628].

Branch v. Willis-Knighton Medical Center, 92-3086 (La. 4/28/94), 636 So. 2d 211, 215. See also, Butler v. Flint Goodrich Hospital, 607 So. 2d 517, 521 (La. 1992) {"It is undisputed that the several provisions of the Louisiana Act [La. R.S. 40:1299.41 et seq.] were a legislative response to the perceived "crisis")}, cert. den., 508 U. S. 909, 113 S.Ct. 2338, 124 L. Ed.2d 249 (1993). Thus, the Louisiana Supreme Court has been clear that the instant statute was enacted as a legislative response to a perceived "medical malpractice crisis" --- it was not enacted with the purpose of discriminating against minors or individuals with latent illnesses or injuries.

Respondent respectfully submits that this statutory history compels the conclusion that the instant statute has a rational basis. The United States Fifth Circuit Court of Appeals has already specifically found the instant statute to have such a rational basis, and is thus constitutional *vis a vis* the Due Process and Equal Protection Clauses of the United States Constitution. In Montagino v. Canale, 792 F.2d 554, 557-558 (5th 1986), the Court of Appeals stated:

> Montagino urges that the three year prescriptive period of Section 9:5628 (A)

constitutes an irrational classification that results in dissimilar treatment of Louisiana medical malpractice victims and ordinary tort victims. The Louisiana statute, however, does not impinge on a fundamental right, see Seoane, 660 F.2d at 150-151, or involve a suspect classification. We must therefore apply minimum scrutiny.

The burden is upon Montagino to show that the classification is "wholly arbitrary." [Citations omitted.] As articulated by the Louisiana Court of Appeal for the First Circuit, Section 9:5628 was enacted

> in response to sharp increases in medical malpractice insurance rates and the resulting threat of reduced health care to the patient and of greatly increased medical costs to the public. Limitation on the time within which an injured person may bring a malpractice action will serve to restrict the number of suits brought. The interests sought to be advanced is the alleviation of the insurance crisis by reducing malpractice claims, thereby reducing medical malpractice insurance rates, resulting in health care being more accessible to patients at reasonable cost. Valentine, 433 So.2d at 292. Montagino has failed to sustain her burden of showing that the challenge classification has no rational relationship to a constitutionally permissible state objective. A

> contention that the medical malpractice prescription statute denies her equal protection of the laws must therefore be rejected.
>
> Montagino's claim that the prescription statute denies her substantive due process must also be rejected. Since, as indicated above, the challenged statute does not restrict the exercise of a fundamental right, my review is limited to the issue of whether the statute is arbitrary. Seoane, 660 F.2d at 150-51. Again, the burden is on Montagino to establish that the statute is arbitrary. Usery v. Turner Elkhorn Mining Co., 428 U.S., 15, 96 S.Ct. 2882, 2892, 49 L. Ed.2d 752 (1976). As indicated above, she has failed to establish that the medical malpractice statute is irrational.

Therefore, the Fifth Circuit Court of Appeals has categorically found the instant statute not to violate Equal Protection and Due Process guarantees of the Fourteenth Amendment.[5]

---

[5] See also Douglass v. Stallings, 870 F.2d 1242, 1249 (7th Cir. 1989) (Indiana Medical Malpractice Statute of Limitations is not in violation of federal Equal Protection and Due Process guarantees, because it is clearly rationally related to its goal of relieving the malpractice insurance crisis and within the province of the Indiana Legislature); Jewson v. Mayo Clinic, 691 F.2d 405, 411-412 (8th Cir. 1982) (Minnesota's Medical Malpractice Statute of Repose is not in violation of Federal Due Process and Equal Protection guarantees even if the right to a medical malpractice action is barred before the damage had occurred, because the Legislature was justifiably concerned about causes of action arising out of incidents occurring years before); Brubaker v. Cavanaugh, 741 F.2d 318, 321-322

The Court of Appeals was entirely correct in its ruling. Respondent respectfully submits that because the instant statute was enacted in good faith as a reasonable legislative response to a perceived medical malpractice insurance crisis, it has a rational basis. Yet the Petitioners now request that this Honorable Court remand this case to the trial court so that they may present "evidence". Petition at 6. Presumably, the "evidence" that the Petitioners wish to adduce will pertain to "the existence or non-existence of a medical malpractice crisis." Petition at 21.

Respondent respectfully submits that for the purposes of rational basis scrutiny such evidence is inappropriate, because there is no doubt that the Louisiana Legislature could have perceived a crisis in the affordability and availability of medical malpractice insurance and enacted the instant statute in response to that perceived crisis. That is all that rational basis scrutiny requires. And, clearly, if the Legislature was mistaken in its perception of a crisis in the affordability and availability of medical malpractice insurance and in response to that erroneous perception enacted ineffective legislation, the proper remedy would be the repeal of the statute through the legislative process.

Or put another way, Respondent respectfully submits that a statute which does not create a suspect or quasi-suspect classification and does not affect a fundamental right and which was intended by the Legislature to be a reasonable

---

(10th Cir. 1984) (Kansas Medical Malpractice Statute of Repose not in violation of federal Due Process and Equal Protection guarantees because such statutes are within the sound discretion of the Legislature and a rational relation exists between the shorter limitation period for health care providers in the legitimate objective of providing quality health care in Kansas.)

response to a perceived problem must not be invalidated simply because a judicial factfinder has decided that some of the Legislature's perceptions were erroneous. This conclusion is particularly true when the judicial factfinder's finding would be based on the opinions of expert witnesses, such as insurance actuaries, who can in good faith disagree with each other. Surely, minimum scrutiny under the Due Process and Equal Protection Clauses of the United States Constitution does not operate to require that the Legislature hold day after day of hearings to ensure that its perception of a social problem and its legislative solution to the problem be absolutely correct. The Louisiana Constitution establishes a legislative process whereby laws are enacted during 60 legislative days annually. This process simply cannot support hearings on every proposed law requiring months of testimony.

Respondent respectfully submits that the instant statute clearly must survive the minimal scrutiny applicable to it in this case, and thus this case should not be remanded to the trial court.

On a final note, such a conclusion is entirely consistent with the purpose of equal protection. The Equal Protection Clause of the Fourteenth Amendment provides heightened protection to discrete and insular minorities within our society against whom the majority possesses prejudice which tends to seriously curtail the operation of those political processes ordinarily relied upon to protect minorities. Plyler v. Doe, 457 U.S. 202, 217, n.14, 102 S.Ct. 2382, 2394 n.14, 72 L.Ed.2d 1234 (1938). Thus, heightened equal protection exists to protect minorities relegated to a position of powerlessness and for whom the normal political process cannot proceed properly. Plyler, 457 U.S. at 217, 102 S.Ct. at 2324.

Respondent respectfully suggests that the class of injured victims of medical malpractice is not a politically powerless class in need of heightened equal protection. Respondent submits that the rights of persons injured as a result of medical malpractice are vigilantly guarded by a very powerful segment of our society, the plaintiffs' bar, who have a strong interest in recovery in tort. There can be no doubt that the plaintiffs' bar participates not only in the litigation of the constitutionality of tort laws, but also in the political process that gives rise to such tort law. Thus, the interests of future victims of medical malpractice are fully protected through the democratic process. And, as this Court has stated:

> [...]in cases where [a statutory classification burdens neither a suspect group nor a fundamental interest], courts are quite reluctant overturn governmental action on the ground that it denies equal protection of the law. The Constitution presumes that, absence some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter who unwisely we may think a political branch has acted.

Vance v. Bradley, 440 U.S. 93, 96-97, 99 S.Ct. 939, 942-943, 59 L.Ed.2d 171 (1979). Therefore, the intervention of this Court is not now warranted.[6]

---

[6] The Petitioners' argument that somehow the existence of AIDS and HIV infection in 1996 is relevant to the issue of the constitutionality of this statute is in error. This statute was enacted in 1976, before medical science had identified the disease and its causative agent. Therefore, the

CONCLUSION

For the reasons stated above, the Medical Center of Louisiana at New Orleans, et. al., Respondent, respectfully requests that this Honorable Court deny the Petition for a Writ of Certiorari. Should a Writ of Certiorari be granted, Respondent asks that La. R.S. 9:5628 be declared fully constitutional *vis a vis* Due Process and Equal Protection Clauses of the United States Constitution.

Respectfully submitted,

RICHARD P. IEYOUB
ATTORNEY GENERAL OF LOUISIANA

By: _____

J. ELLIOTT BAKER
Assistant Attorney General

601 Poydras Street, Suite 1725
New Orleans, Louisiana 70130
Telephone: (504) 599-1200
Facsimile: (504) 599-1212
Counsel for Respondents,
The Medical Center of Louisiana at
New Orleans, et. al.

---

instant statute could not possibly have resulted from a majoritarian prejudice against HIV positive people. In any event, the Petitioners do not have standing to challenge the instant statute based on an alleged discrimination against HIV positive individuals.

IN RE: MEDICAL REVIEW PANEL No. 95-13006,

DIVISION "G"

FOR THE CLAIM OF: CIVIL DISTRICT COURT

CLARENCE BROWN AND PARISH OF ORLEANS

GAIL O'CONNOR BROWN STATE OF LOUISIANA

EXCEPTION OF PRESCRIPTION

NOW INTO COURT, through undersigned counsel, come defendants, Charity Hospital and Medical Center of Louisiana at New Orleans and Dr. A and Dr. B, appearing herein solely for the purpose of this exception, and except to the plaintiffs' complaint of medical malpractice on the following grounds.

That plaintiffs' complaint of medical malpractice filed with the Commissioner of Administration, pursuant to LSA-R.S. 40:1299.39, on its face shows that the cause of action therein stated occurred more than one (1) year and more than three (3) years prior to the filing of the complaint and is therefore prescribed by the prescription of one (1) and

three (3) years, all as is more fully set forth in the memorandum of authorities attached and made part thereof.

Wherefore exceptors pray that this exception be maintained and that, there be judgment in favor of the defendants, Charity Hospital and Medical Center of Louisiana at New Orleans and Drs. A & B, and against the plaintiffs Clarence Brown and Gail O'Connor Brown, dismissing their complaint at their costs.

Respectfully submitted,
RICHARD P. IEYOUB
ATTORNEY GENERAL

BY: _____
PHILIP H. KENNEDY
ASSISTANT ATTORNEY GENERAL
(BAR ROLL NO.: 7786)
LOUISIANA DEPARTMENT OF JUSTICE
LITIGATION DIVISION
601 POYDRAS STREET, SUITE 1725
NEW ORLEANS, LOUISIANA 70130
TELEPHONE NO.: (504) 599-1200
FAX NO.: (504) 599-1212

IN RE: MEDICAL REVIEW PANEL NO. 95-13006,

DIVISION "G"

FOR THE CLAIM OF: CIVIL DISTRICT COURT

CLARENCE BROWN AND PARISH OF ORLEANS

GAIL O'CONNOR BROWN STATE OF LOUISIANA

MEMORANDUM IN SUPPORT OF
EXCEPTION OF PRESCRIPTION

This claim of medical malpractice arises out of the medical treatment rendered to the plaintiffs' minor daughter and was brought pursuant to the provisions of LSA-R.S. 40:1299.39 et seq., entitled Malpractice Liability for State Services. The purported defendants are Charity Hospital and Medical Center of Louisiana at New Orleans, Dr. "A" and Drs. "B".

According to the allegations of the complaint, plaintiffs' minor daughter developed a cyst on her chest and underwent a surgical procedure for removal thereof in 1987. It was further alleged that the daughter's right breast has

failed to develop normally - presumable from the effects of surgical cystectomy ------ and that she will be required to undergo corrective surgeries for this problem. Plaintiffs also alleged that "in early February, 1994 . . ." their daughter was seen and evaluated at Charity Hospital and at Tulane Medical Center whereupon the daughter's condition and the need for corrective treatment were confirmed; however no relationship between the patient's condition and the past surgical procedure was expressed. A copy of the plaintiffs' complaint filed with the commissioner of administration on May 6, 1995, is attached as an exhibit.

LSA-R.S. 9:5628 provides with respect to actions for medical malpractice that:

> "A. No action for damages for injury of death against any physician, chiropractor, dentist, psychologist, hospital duly licensed under the laws of this state, or community blood center or tissue bank as defined in R.S. 40:1299.41 (A), whether based upon tort, or breach of contract, or otherwise, arising out of patient care shall be brought unless filed within one year from the date of the alleged

> act, omission, or neglect, or within one year from the date of discovery of the alleged act, omission, or neglect; however, even as to claims filed within one year from the date of such discovery, in all events such claims shall be filed at the latest within a period of three years from the date of the alleged act, omission, or neglect.
>
> "B. The provisions of this Section shall apply to all persons whether or not infirm or under disability of any kind and including minors and interdicts."

LSA-R.S. 9:5628 has been interpreted to be "a prescription statute with one qualification, that is that the contra non valentem type exception to prescription embodied in the discovery rule is expressly made inapplicable from the act, omission or neglect." Crier v. Whitecloud, 496 So.2d 305 (La. 1986). More recently in In Re Medical Review Panel For Claim of Lionel Milton, 593 So.2d 795 (La. App. 4th Cir., 1992), the Court held that the discovery exception of the doctrine of contra non valentem suspending prescription when plaintiff could not reasonable have discovered injury did not apply to medical malpractice

actions for the reason that LSA-R.S. 9:5628 expressly made the doctrine inapplicable.

Plaintiff's complaint, which by reason of its supporting allegations is subject to the provisions of LSA-R.S. 9:5628, is on its face prescribed since it was not filed within a period of one year or three years from the date of the alleged offending act, omission or neglect. The burden, therefore, falls upon the plaintiff to establish, if he can, interruption, suspension or other reasons why prescription has not accrued against his claim. In re Medical Review Panel For Claim of Lionel Milton, 593 So.2d 795 (La. App. 4th Cir., 1992).

Respectfully submitted,
RICHARD P. IEYOUB
ATTORNEY GENERAL
BY: _____
PHILIP H. KENNEDY
ASSISTANT ATTORNEY GENERAL
(BAR ROLL NO.: 7786)
LOUISIANA DEPARTMENT OF JUSTICE
DIVISION OF LITIGATION
601 POYDRAS STREET, SUITE 1725
NEW ORLEANS, LOUISIANA 70130

TELEPHONE: (504) 599-1210
FAX: (504) 599-1212

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing document has been served upon counsel of record by depositing same in the United States Mail, postage prepaid, this ____ day of _____, 1996.

_____
PHILIP H. KENNEDY

IN RE: MEDICAL REVIEW PANEL NO. 95-13006,

DIVISION "G"

FOR THE CLAIM OF: CIVIL DISTRICT COURT

CLARENCE BROWN AND PARISH OF ORLEANS

GAIL O'CONNOR BROWN STATE OF LOUISIANA

OPPOSITION TO EXCEPTION OF PRESCRIPTION

NOW INTO COURT, through undersigned counsel comes Clarence Brown, Gail O'Conner Brown on behalf of their Minor child, Crystal Brown, all plaintiffs, who respectfully represent:

I.

On July 10, 1985 Crystal Brown, when she was 18 months old, had surgery for a right breast biopsy.

II.

Inpatient records from Crystal's admission in July 1985, indicate that Dr. Karen Monique Lucas did the admission workup, Dr. Moynihan and Dr. AnnG. Boozer were the surgeons, and Dr. Webb was the Chief of Service.

III.

The Operative Record indicated the right breast mass was excised without difficulty. (Exhibit 4). The Surgical Pathology Report indicated the mass was consistent with virginal hypertrophy (an increase in size) which is a benign condition. The Pathologist was Dr. N. A. Schor. (Exhibit 5).

IV.

On December 22, 1993, Crystal was seen for a complaint of "one breast larger than another." At this time she was referred to Endocrinology with the physician nothing the left breast was significantly larger than the right breast. (Exhibit 8).

V.

Crystal was seen by Dr. James in the Outpatient Department on a referral from the Pediatric Clinic for a complaint of no breast development. Dr. James arranged for an Endocrinology Clinic evaluation on February 3, 1994. (Exhibit 9).

VI.

On February 3, 1994, Crystal was seen in the Endocrinology Clinic where she was diagnosed as having no development of her right breast probably secondary to the breast tissue being surgically removed. (Exhibit 10). At this time she was referred to Plastic Surgery for a breast prosthesis. Photographs of Crystal are at Exhibit 11.

VII.

It is plaintiff's contention that under the language of LSA-R.S. 9:5628, there can be no negligent, "action, omission, or neglect" on a particular organ, until the organ actually comes into existence. Therefore, Miss Brown contends that prescription runs, not from the date of the wrongful act, but from the damage; until plaintiff has actual or constructive knowledge of the causal relation between the tortious acts and the damage, prescription does not begin to run. "Prescription runs not from the date of the wrongful act, but from the damage. Rayne State Bank & Trust Company

v. National Union Fire Ins., 483 So.2d at 995. Until plaintiff has actual or constructive knowledge of the causal relationship between the tortious acts and the damage, prescription does not begin to run. Sartin v. St. Paul Fire & Marine Ins. Co., 359 So.2d at 651." quoting Abrams v. Herbert, 590 So.2d 1291 (La. App. 1 cir, 1991).

VIII.

The plaintiff also argues that Charity Hospital and the Medical Center of Louisiana at New Orleans continually treated Mrs. Brown's from the time of the cysectomy and throughout her entire life and on the basis of her continual treatment and their continued professional relationship, prescription was suspend due to the continuing relationship exception of contra non valentem. Taylor v. Giddens, App. 2 Cir, 1992, 607 So.2d 878, writ granted 612 So.2d 43, affirmed in part, reversed in part 618 So.2d 834, 843, Trainor v. Young, 561 So.2d 722 (La. App. 2d Cir. 1990), writ

denied., 567 So.2d 1124, 1125 (La. 1990), and Abrams v. Herbert, 590 So.2d 1291 (App. 1 Cir. 1991).

WHEREFORE, plaintiff prays that defendant's Exception of Prescription be dismissed at defendant's cost.

Respectfully submitted:

KATHLEEN M. BILBE (#3040)
A PROFESSIONAL LAW CORPORATION
5670 Haynes Boulevard
New Orleans, LA 70126-1124
Telephone: (504 246-5297

IN RE: MEDICAL REVIEW PANEL NO. 95-13006,

DIVISION "G"

FOR THE CLAIM OF: CIVIL DISTRICT COURT

CLARENCE BROWN AND PARISH OF ORLEANS

GAIL O'CONNOR BROWN STATE OF LOUISIANA

MEMORANDUM IN OPPOSITION TO EXCEPTION OF PRESCRIPTION

There are no cases with similar facts – a child's ability to develop sex organs is destroyed in their pre-pubescent stage. The legislature in drafting the following prescription statute for a medical malpractice action could not have anticipated the unique factual basis of Miss Brown's claim. Specifically, Miss Brown is suing for the lack of the breast, not for the loss of the gland that produces the breast.

The pertinent prescription statute for actions involving medical malpractice is:

LSA-R.S. 9:5628. ACTIONS FOR MEDICAL MALPRACTICE

> A. No action for damages for injury or death against any physician, chiropractor, dentist, psychologist hospital duly licensed under the laws of the state, or community blood center or tissue bank as defined in R.S. 40:1299.41 (A), whether based upon tort, or breach of contract, or otherwise, arising out of patient care shall be brought unless filed within one year from the date of the alleged **act, omission, or neglect**, or within one year from the date of discovery of the alleged act, omission, or neglect, however, even as to claims filed within one year from the date of such discovery, in all events such claims shall be filed at the latest within a period of three years from the date of the alleged act, omission, or neglect. [emphasis added]
>
> B. The provision of this Section shall apply to all persons whether or not infirm or under disability of any kind and including minors interdicts.

Concerning prescription it is plaintiff's contention that there can be no negligent, "act, omission, or neglect" on a particular organ, until the organ actually comes into existence. Therefore, Miss Brown contends that prescription

runs, not from the date of the surgery, but from the damage; until plaintiff knowledge of the tortious acts and the resulting damage, prescription does not begin to run.

> "Prescription runs not from the date of the wrongful act, but from the damage. Rayne State Bank & Trust Company v. National Union Fire Ins., 483 So.2d at 995. Until plaintiff has actual or constructive knowledge of the causal relationship between does not begin to and the damage, prescription does not begin to run. Sartin v. St. Paul Fire & Marine Ins. Co., 359 So.2d at 651." quoting Abrams v. Herbert, 590 So.2d 1291 (La. App. 1 Cir. 1991).

Miss Brown was 18 months old when she had the cystectomy and she did not start to develop breast until she was nine year old. Since it took eight more years for Miss Brown to develop breasts then prescription should be suspended and/or interrupted until the child physically develops breasts. Also the mere apprehension that something is wrong will not commence running of prescriptive period. White v. Willis-Knighton Medical Center, App. 2 Cir. 1994, 632 So.2d 1198, writ denied 94-1024, 638 So.2d 1098.

In the instant case, the face of plaintiff's pleading indicates that she had knowledge of her cause of action arising on December 22, 1993, when Miss Brown was seen for a complaint of "one breast larger than another," but not prior to that date. At this time she was referred to Endocrinology with the physician noting the left breast was significantly larger than the right breast. (Exhibit 8). Because December 22, 1993 is within one year prior to March 4, 1994, the date plaintiff's complaint was filed, but not within three years of the July 10, 1985 cystectomy, the position of the defendant health care provider is that the petition is prescribed on it's face. Therefore, Charity Hospital and the Medical Center of Louisiana will claim that the plaintiff will bear the burden to prove the claim has not prescribed.

The burden of proof generally rests upon the party pleading prescription as an affirmative defense. Abrams v. Herbert, 590 So.2d 1291 (La.App. 1 Cir. 1991). Where,

however, plaintiff's petition shows on its face that the asserted claim has prescribed, plaintiff bears the burden of proving interruption or suspension of prescription sufficient to bring the action within the prescriptive period. Hunter v. Sisters of Charity of Incarnate Word, 236 So.2d 565, 567 (La.App, 1st Cir.1970) quoting Abrams v. Herbert, 590 So.2d 1291 (La.App. 1 Cir. 1991). Whether a pleading has prescribed on its face must be determined, in part, according to the date plaintiff alleged knowledge of the tortious act, the damage, and causal relation between the wrongful act and the damage. Chaney. State, Through the Dept. of Health, 432 So.2d 256, 259-60 (La.1983). The burden of proof does not shift to plaintiff unless the face of her petition reveals that she had knowledge of the damage and its cause at a time beyond the prescriptive period. Leyva v. Laga, 549 So,.2d 914, 916-17 (La.App. 3rd Cir.1989).

The burden of proof clearly rests on the exceptor raising the affirmative defense of prescription. Abrams,

supra. When a claim is prescribed on the face of the petition, the burden then shifts back to the plaintiff to establish interruption or suspension of prescription. Ward v. Abasi, App. 3 Cir.1993, 616 So.2d 778, writ denied 617 So.2d 1182. The plaintiff whose claims have prescribed on its face bears the burden of showing suspension or interruption of prescription. Taylor v. Giddens, App. 2 Cir.1992, 607 So.2d 878, writ granted 612 So.2d 43, affirmed in part, reversed in part 618 So.2d 834. When it appears on the face of the petition that prescription has accrued, the plaintiff must allege and prove facts indication that injury and causal relationship to alleged misconduct were not apparent or discoverable until within the year before the suit was filed. White v. Willis-Knighton Medical Center, App. 2 Cir.1994, 632 So.2d 1198, writ denied 94-1024, 638 So.2d 1098. In general, the burden, therefore, shifts back to the plaintiff to establish, if he can, interruption, suspension or other reasons why prescription has not accrued against his claim.

None of the cases cited by either of the parties have facts similar to Miss Brown's heartbreaking - a child's sex organs are destroyed in their prepubescent stage. Further, Miss Brown's claim has not prescribed on it's face - she alleges the development of breasts less than three months prior to her claim being filed with the Commissioner of Insurance. Therefore, her claim has not prescribed on it's face and the burden still remains with the exceptor to prove prescription by way of applicable case law.

A very important and favorable case is Taylor v. Giddens, App. 2 Cir.1992, 607 So.2d 878, writ granted 612 So.2d 43, affirmed in part, reversed in part 618 So.2d 834, which held that prescription does not run against one who is ignorant upon which his cause of action is based as long as such ignorance is not willful, negligent or unreasonable. Significantly, this court also found that even if a medical malpractice victim is aware that an undesirable condition has developed at some point in time after medical treatment,

prescription will not run as long as it was reasonable for plaintiff not to recognize that the condition might be related to treatment. In the case at bar it is completely reasonable and not willful, negligent or unreasonable for Miss Brown not to recognize her condition until she went through puberty and developed breasts; there was no undesirable condition at all until Miss. Brown approached puberty. Another important case has held the prescription runs not from the date of the wrongful act, but from the damage; in other words not until plaintiff had any kind of knowledge of the tortious act, much less its causal connection to the damage, prescription would not begin to turn. Abrams v. Herbert, App.1 Cir.1991, 590 So.2d 1291.

Prescription does not run in a medical malpractice action against one who is ignorant of facts upon which his claim is based, as long as such ignorance is not willful, negligent or unreasonable. Richardson v. Moffett, App. 3 Cir.1992, 608 So.2d 275, writ denied 612 So.2d 81. This

case also found that even if a malpractice victim is aware that an undesirable condition developed at some point in time after medical treatment, prescription does not run as long as it was reasonable for victim not to recognize that the condition may be related to treatment.

The Louisiana Supreme Court in Corsey v. State Dept. of Corrections, 375 So.2d 1319 (La.1979), defined four scenarios where prescription would be suspended. Only (3) and (4) are applicable in the case at bar.

> (3) Where the debtor himself has done some act effectively to prevent the creditor from availing himself of his cause of action; and
> (4) Where the cause of action is not known or reasonably knowable by the plaintiff, even though his ignorance is not induced by the defendant.

In Chaney v. State, Through the Dept. of Health, 432 So.2d 256 (La. 1983) our Supreme Court held that the legislature has, in a limited manner, overruled the fourth category (referred to as the discovery exception) of contra non valentem. Analyzing the one and three year prescriptive

periods of R.S. 9:5628, the court subsequently recognized that the discovery exception is applicable to the one year period, but is expressly inapplicable to the three year period. Hebert v. Doctors Memorial Hospital, 486 So.2d 717 (La.1986); Crier v. Whitecloud, 496 So.2d 305 (La.1986).

> "Thus, lack of knowledge by a plaintiff will suspend the one year period within which he must institute proceedings, but in no event will lack of knowledge suspend prescription more than three years." In re Medical Review Panel For Claim of Milton, App. 4 Cir.1992, 593 So.2d 795, 798. [emphasis added]

Therefore, the plaintiff in a medical malpractice action can only avail himself of the discovery exception of contra non valentem for the one year period within which he must file suit, but not as to suspend prescription more than three years. In the case at bar, the December 22, 1993, medical records note that Miss Brown was seen for a complaint of "one breast larger than the other." She was referred to the Endocrine Clinic (Exhibit 8), with the physician noting that

one breast was significantly larger than the other. This occurred less than one year prior to filing her claim. Since there was no damage prior to three months before she sued Miss Brown surely would have been met with exceptions of prematurity and no cause of action had she acted earlier.

The medical records are clear that Charity Hospital and the Medical Center of Louisiana at New Orleans continually treated Miss Brown's from the time of the cystectomy and throughout her entire life and on the basis of her continual treatment and their continued professional relationship, prescription was clearly suspended due to the "continuing relationship" exception of contra non valentem. Taylor v. Giddens, App. 2 Cir.1992, 607 So.2d 878, writ granted 612 So.2d 43, affirmed in part, reversed in part 618 So.2d 834, 843, Trainor v. Young, 561 So.2d 722 (La. App. 2d Cir. 1990), writ denied., 567 So.2d 1124, 1125 (La. 1990). And Abrams v. Herbert, 590 So.2d 1291 (App.1 Cir.1991). The basis for interrupting prescription is the

premise that the professional relationship is likely to hinder the patient's inclination to sue. Hence, even if Miss Brown did know that she would not develop breasts in the future, her propensity to sue was hindered due to the continual treatment of Miss Brown by Charity Hospital and the Medical Center of Louisiana at New Orleans.

In conclusion, Clarence brown and Gail O'Conner Brown respectfully submit that exceptor, Charity Hospital and Medical Center of Louisiana have not met the burden of proof establishing that Crystal Brown's claim for malpractice has prescribed. Therefore, the exception of prescription should be dismissed.

Respectfully submitted:

KATHLEEN M. BILBE (#3040)
A PROFESSIONAL LAW CORP.
5670 Haynes Boulevard
New Orleans, LA 70126-1124
Telephone: (504) 246-5297

IN RE: MEDICAL REVIEW PANEL NO. 95-13006,

DIVISION "G"

FOR THE CLAIM OF: CIVIL DISTRICT COURT

CLARENCE BROWN AND PARISH OF ORLEANS

GAIL O'CONNOR BROWN STATE OF LOUISIANA

PLAINTIFF'S EXHIBIT LIST

NOW INTO COURT, through undersigned counsel, comes plaintiff, Crystal Brown, who submits the following exhibits that will be introduced into the record at the trial of this matter.

July 10, 1985 Charity Hospital
Admission and Operating Records P-4

December 23, 1993, Medical Center of
Louisiana Emergency Room Records P-8

February 3, 1994, Charity Hospital
Record of Outpatient Department P-9

Photographs of Crystal Brown P-11

Respectfully submitted:

KATHLEEN M. BILBE (#3040)
A PROFESSIONAL ALW CORP.
5670 Haynes Boulevard
New Orleans, LA 70126-1124
Telephone: (504) 246-5297

IN RE: MEDICAL REVIEW PANEL NO. 95-13006,

DIVISION "G"

FOR THE CLAIM OF: CIVIL DISTRICT COURT

CLARENCE BROWN AND PARISH OF ORLEANS

GAIL O'CONNOR BROWN STATE OF LOUISIANA

SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO EXCEPTION OF PRESCRIPTION

NOW INTO COURT, through undersigned counsel comes Clarence Brown, Gail O'Connor Brown on behalf of their Minor child, Crystal Brown, all plaintiffs, who respectfully represent:

There are no cases which have dealt with the particular facts of this case – a child's ability to develop sex organs is destroyed in their pre-pubescent stage. There is a case which does present very similar arguments which is Whitnell v. Sivlerman, et al., CDC Case No. 86-17050, La. Sct. Case No. 95-CA-0259, which is presently pending before the Louisiana Supreme Court. For instance, a main

issue in the Whitnell case is whether LSA R.S. §9:5628 was passed in response to an unsubstantiated "medical malpractice crisis." If the Supreme Court agrees that the "crisis" was unsubstantiated, then the holding in Crier v. Whitecloud, 496 So.2d 305, 308 (La. 1986) must then be reevaluated in light of the evidence presented in the instant case.

It is plaintiff's contention that the legislature in drafting LSA R.S. §9:5628 could not have anticipated the unique factual basis of Miss Brown's claim. Specifically, Miss Brown is suing for the loss of her breast, which was non-existent for longer than three (3) years after the prescriptive date, under the current law. She was not suing for the loss of the gland that produces the breast, which was wrongfully removed by the defendants in this case.

LSA R.S. § 9:5628 IS UNCONSTITUTIONAL AS IT DEPRIVES CRYSTAL BROWN AND OTHERS SIMILARLY SITUATED OF DUE PROCESS OF LOUISIANA LAW, ACCESS TO THE COURTS AND UNFAIRLY DISCRIMINATES ON THE BASIS OF

PHYSICAL CONDITION

No person shall be deprived of life, liberty or property, except by due process of law. Louisiana Constitution Article I, §2.

No person shall be denied the equal protection of the law. No law shall discriminate against a person because of race or religious ideas, belief, or affiliations. The Louisiana Constitution Article I, §3 specifically states, "No law shall arbitrarily, capriciously, or unreasonable discriminate against a person because of birth, age, sex, culture, **physical condition**, or political ideas or affiliation." [Emphasis added]

All courts shall be open, and every person shall have an adequate remedy by due process of law and justice, administered without denial, partiality, or unreasonable delay, for injury to him and his person, property, reputation, or other rights. Louisiana Constitution Article I, §22. [Emphasis added]

When an injury has occurred, which gives the injured party a cause of action, that a cause of action becomes "a vested property right which is protected by the guarantee of due process." Burmaster v. Gravity Drainage District No. 2, 366 So.2d 1381, 1387 (La. 1978). Crier v. Whitecloud, 496 So.2d 305, 308 (La. 1986).

Equal protection of the law means that State laws must affect alike all persons similarly situated. Valentine v. Thomas, 433 So.2d 289, 292 (La. App. 1st Cir., 1993), Writ denied, 440 So.2d 728 (La. 1983). LSA R.S. §9:5628 has created a serious constitutional problem of depriving victims of medical negligence in Louisiana like Crystal Brown of access to our courts.

Under traditional Louisiana Equal Protection theory, the scrutiny is heightened when either a suspect class or a fundamental right is involved. Succession of Robbins, 349 So.2d 276 (La. 1977), Everett v. Goldman, 359 So.2d 1256 (La. 1978), Burmaster v. Gravity Crainage District No. 2,

366 So.2d 1381 (La. 1978) and Sibley v. Board of Supervisors, 477 So.2d 1094 (La. 1985). Crystal Brown, our now twelve year old current plaintiff, is a member of a suspect class since she has been physically impaired by these defendants' wrongful act.

THE FUNDAMENTAL RIGHT TO HAVE ACCESS TO THE COURTS

In the present case LSA R.S. §9:5628 presents both a suspect classification and the loss of a fundamental right. LSA - R.S. §9:5628 creates two distinct classes of individuals. The first, which includes Crystal Brown, are those victims of medical negligence whose cause of action did not manifest itself within three years who are unable to recover for their injuries. The second class consists of those individuals who have been victims of medical negligence whose injuries do manifest within three years from the date of the tortious conduct who are allowed to recover for their injuries.

R.S. §9:5628 also interferes with Crystal Browns fundamental right to have access to the courts because she is barred from the right to sue and obtain a remedy for a civil wrong committed on her. It has been well established that access to the courts is a fundamental right. Ryland v. Shapiro, 708 F.2d 967 (5th Cir. 1983). The present case is about an innocent young girl who is denied access to court. Even though the medical negligence committed upon her wasn't known or knowable to her and she did not have any symptoms or manifestations of any problems until she reached puberty eight years later, she is still barred from the court.

SUSPECT CLASSIFICATION

In addition, the statute does not affect all persons who undergo medical treatment equally. rather, it vests in some patients a cause of action for medical malpractice which it does not vest in others - specifically those whose injuries do not manifest within three years from the date of

the tortious conduct are barred from suing. The Supreme Court found in Taylor v. Giddens, 618 So.2d 834 (La. 1003), when a certain class of claimants would be time barred from filing suit before their cause of action even arose, the statute cannot equally affect all medical malpractice claimants or treat them the same. LSA - R.S. §9:5628 therefore, creates a suspect classification based on one's physical condition.

Crystal Brown faces an intrusion upon both her rights to equal protection and her right to access to the courts, based upon her physical condition of being a child and therefore unable to develop breasts. The remedy to address a civil wrong has been eliminated before the accrual of her cause of action. Medical malpractice victims who have disabilities which are discoverable within a three (3) year period are allowed to seek damages under LSA - R.S. § 9:5628 while those victims, such as Crystal Brown, who suffer from disabilities which are not discoverable by them in three years, by no fault of their own, are denied the right to

seek damages.

CRIER V. WHITECLOUD, 496 SO.2D 304 (LA 1986) WHICH HOLDS THAT THE ONE AND THREE YEAR PERIODS OF LA. R.S. §9:5628 ARE PRESCRIPTIVE AND CONSTITUTIONAL SHOULD BE OVERRULED IN LIGHT OF THE FACTS OF THIS CASE AND SUBSEQUENT LOUISIANA JURISPRUDENCE

When Crystal Brown and victims similarly situated cannot discover their latent medical conditions, they are deprived of access tot he courts and are unconstitutionally discriminated against based upon their physical conditions.

The facts of the present case show that Crystal Brown had no symptoms or manifestations at all after her July 10, 1985 right breast biopsy at the age of one and a half years old up until December 22, 1993. Therefore she had no legal "notice" of her treating physicians negligent and tortious acts performed upon herself.

Crystal Brown is within a category of people who are discriminated against by LSA - R.S. §9:5628 she is denied due process because she had no notice. Furthermore, it was

impossible for her to know that malpractice may have been committed since she did not have any symptoms within three (3) years of the date of the wrongful act. Clarence and Gail O'Connor Brown, plead here not only for themselves and their minor child, but also for all consumers of medical care who lose rights before they accrue. Clearly, the Act's three year period denies Crystal Brown due process of Louisiana law.

WHEREFORE, plaintiff prays that defendant's Exception of Prescription be dismissed at defendant's cost.

Respectfully submitted:

KATHLEEN M. BILBE (#3040)
A PROFESSIONAL ALW CORP.
5670 Haynes Boulevard
New Orleans, LA 70126-1124
Telephone: (504) 246-5297

IN RE: MEDICAL REVIEW PANEL	NO. 95-13006,
	DIVISION "G"
FOR THE CLAIM OF:	CIVIL DISTRICT COURT
CLARENCE BROWN AND	PARISH OF ORLEANS
GAIL O'CONNOR BROWN	STATE OF LOUISIANA

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF DEFENDANTS' EXCEPTION OF PRESCRIPTION

NOW INTO COURT, through undersigned counsel comes Charity Hospital of Louisiana at New Orleans and Drs. A and B who submit this Supplemental Memorandum in Support of Defendants' Exception of Prescription in addition to their previously filed memorandum.

I. FACTS

At the hearing on this exception, previously set for hearing on November 22, 1996, this Honorable Court declined to rule on this exception because the Louisiana Supreme Court had not yet ruled in Whitnell vs. Silverman, now 686 So.2d 23 (La. 1996), in which the Fourth Circuit

Court of Appeal had found LSA-R.S. 9:5628 unconstitutional as applied to causes of action arising from diseases with a latency period of over three years and had found R.S. 9:5628 to be an unconstitutional violation of Louisiana Constitution Article 1922 (access to the courts). Whitnell v. Silverman, 646 So.2d 989 (La. App. 4th Cir. 1994). Since the Supreme Court Whitnell decision came out on December 6, 1996, it is now appropriate to reset the instant exception.

II. ARGUMENT

a. The Whitnell Case

The Louisiana Supreme Court has reversed the Fourth Circuit, stating that R.S. 9:5628 is constitutional as applied to the plaintiff. Thus the three year prescription period of LSA-R.S. 9:5628 remains the law. The court rejected the plaintiff's invocation of the doctrine of contra non volentum on the basis that the defendant had not intentionally, fraudulently or by ill practice prevented the

timely filing of Mrs. Whitnell's action; similarly, in the instant case there has been no showing of fraud or ill practice.

Since the Supreme Court has held that Mrs. Whitnell lacked standing to challenge the constitutionality of LSA-R.S. 9:5628 in its application to persons with diseases characterized as having latency periods in excess of three years, the three year period remains the limit beyond which action for medical professional liability may not be brought before the courts

B. The Effect of Whitnell in this Case

Since the three year period of LSA-R.S. 9:5628 has been declared constitutional, plaintiff's filing in the case before this court has prescribed.

In Whitnell the Supreme Court also has re-affirmed its prior ruling in Crier v. Whitecloud, 496 So.2d 305 (La. 1986), which held that:

1) Article 1 Section 22 does not warrant a remedy for every single injury, and
2) In setting a statute of limitation, a legislature does not eliminate the remedy for a civil wrong-it makes a legislative determination that after a certain period of time no cause of action can arise. (Crier, p. 309).

III. CONCLUSION

In light of the Supreme Court decision in Whitnell v. Silverman, defendants respectfully request that this Honorable Court grant their Exception of Prescription and dismiss plaintiffs' suit at plaintiffs' cost.

RESPECTFULLY SUBMITTED,

RICHARD P. IEYOUB
ATTORNEY GENERAL

BY: _____
MARILYN R. COHEN (NO. 4325)
ASSISTANT ATTORNEY GENERAL
LOUISIANA DEPARTMENT OF JUSTICE
601 POYDRAS STREET, SUITE 1725
NEW ORLEANS, LOUISIANA 70130
TELEPHONE: (504) 599-1200
FAX: (504) 599-1212

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 95-13006 **DIVISION "G"**

CLARENCE BROWN, ET AL

VERSUS

MEDICAL CENTER OF LOUISIANA AT NEW ORLEANS, ET AL

FILED:_____ _____

DEPUTY CLERK

JUDGMENT

An Exception of Prescription filed by State of Louisiana, through Medical Center of Louisiana (Charity Hospital), and Doctors A & B came for hearing on the 23rd day of May, 1997.

Appearances:

Kathleen Bilbe, Attorney for Plaintiff, Clarence Brown and Gail O'Conner Brown;

Marilyn R. Cohen, Attorney for Defendant, State of Louisiana through Medical Center of Louisiana (Charity

Hospital) and Doctors A & B

Considering the pleadings, arguments of counsel for reasons already assigned;

IT IS ORDERED, ADJUDGED AND DECREED that the Exception of Prescription filed by defendants be, and the same is hereby granted;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the claims and demands of plaintiffs, Clarence Brown and Gail O'Conner Brown on behalf of their minor child, Crystal Brown, are hereby dismissed with prejudice, each party to bear its costs.

New Orleans, Louisiana, this __ day of _____, 1997.

_____

J U D G E
DIVISION "G"

Respectfully submitted,
RICHARD P. IEYOUB
ATTORNEY GENERAL

BY: _____

MARILYN R. COHEN (# 4235)
Assistant Attorney General
LOUISIANA DEPARTMENT OF JUSTICE
LITIGATION DIVISION
601 POYDRAS STREET SUITE 1725
NEW ORLEANS, LOUISIANA 70130
(504) 599-1200

Entered July 1, 1998

IN RE: MEDICAL REVIEW PANEL FOR THE CLAIM OF CLARENCE BROWN AND GAIL O'CONNOR BROWN	*** NO. 97-CA-2803** ***** *** COURT OF APPEAL** ***** *** FOURTH CIRCUIT** *** STATE OF LOUISIANA**

* * * * * * *

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 95-13006, DIVISION "G"
HONORABLE ROBIN M. GIARRUSSO, JUDGE

* * * * * *

DENIS A. BARRY
JUDGE

* * * * * *

(Court composed of Judge Denis A. Barry, Judge William H. Byrnes, III, Judge Miriam G. Waltzer)

CHARLES OWEN TAYLOR
C. SCOTT CARTER
ADRIENE LaCOUR
CARTER & TAYLOR
HERITAGE PLAZA, SUITE 900
111 VETERANS BOULEVARD
METAIRIE, LOUISIANA 70005
COUNSEL FOR CLARENCE & GAIL BROWN/APPELLANTS

RICHARD P. IEYOUB
ATTORNEY GENERAL

JULY 01 9998

J. ELLIOTT BAKER
ASSISTANT ATTORNEY GENERAL
601 POYDRAS STREET, SUITE 1725
NEW ORLEANS, LOUISIANA 70130
COUNSEL FOR MEDICAL CENTER OF N.O./APPELLEE

AFFIRMED

"s/DAB"
"s/WHB"
"s/MW"

Plaintiffs appeal the dismissal of their medical malpractice claim based on prescription. They argue they are entitled to a hearing on the constitutionality of the prescription statute, La. R.S. 9:5628; alternatively, prescription was interrupted or suspended based on the defendants' continuing relationship with the injured plaintiff. We affirm.

Facts

On July 12, 1985, two physicians at Charity Hospital (now the Medical Center of New Orleans) removed a mass from the right breast of seventeen month old Crystal Brown.

The lesion was benign. Crystal was discharged from the pediatric surgery clinic on August 19, 1985.

When Crystal reached puberty, her left breast developed but her right breast did not. On February 3, 1994, she and her parents were informed that the right breast would not develop because the breast tissue was surgically removed in 1985. On May 6, 1994, Crystal's parents filed a complaint of medical malpractice with the commissioner of administration against Charity and the two doctors. The complaint is not in the record. The parties do not dispute the filing date.

The defendants, represented by the Louisiana Attorney General's Office, invoked the jurisdiction of the district court and urged prescription. The Browns' opposition asserted that prescription did not commence until they knew of the damage; and prescription was interrupted or suspended because the defendants had a continuing professional relationship with Crystal. In a supplemental

memorandum in opposition to the exception, the Browns alleged that the prescription statute is unconstitutional. The trial court granted the exception and dismissed the suit with prejudice.

Prescription

A malpractice claim prescribes one year from the alleged act, omission, or neglect, or one year from discovery of the alleged act, omission, or neglect. La.R.S. 9:5628. However, no claim may be filed after three years of the alleged act, omission, or neglect.

> (E)ven as to claims filed within one year from the date of such discovery, in all events such claims shall be filed at the latest within a period of three years from the date of the alleged act, omission, or neglect.

La. R.S. 9:5628A.

Thus §5628 abrogates in malpractice cases the "discovery" rule, the fourth category of the judicially created doctrine of *contra non valentem*. Boudoin v. Nicholson,

Baehr, Calhoun & Lanasa, 96-0363, p. 7 (La. App. 4 Cir. 7/30/97), 698 So. 2d 469,473.

The Browns did not commence their malpractice claim within three years from the 1985 surgical removal of the breast. Their claim prescribed under La. R.S. 9:5628.

Continual Treatment

The Browns argue prescription was interrupted due to Crystal's continual treatment by defendants. Because the Browns assert interruption or suspension, they have the burden of proving that prescription was interrupted or suspended. Tullier v. St. Frances Cabrini Hospital, 96-738, p. 3 (La. App. 3 Cir. 2/5/97), 689 So. 2d 529, 530, writ den. 97-1233 (La. 9/5/97), 700 So. 2d 508.

Interruption of prescription by a doctor's continued professional relationship with the patient is not based on continuous treatment constituting a continuing tort. Rather, it is based on the premise that the professional relationship

will likely hinder the patient's inclination to sue. Abrams v. Hebert, 590 So. 2d 1291, 1295 (La. App. 1st Cir. 1991).

The record contains no evidence of a continuous relationship between Crystal and the defendants. Medical records submitted by the Browns show that Crystal was an inpatient for the 1985 surgery and that she returned to Charity in 1993 and 1994. There is no basis to hold that prescription was interrupted by a continuing professional relationship.

In their reply brief, the Browns' argue that "the continuing tort of failure to inform existed."

Under the continuous tort doctrine, prescription does not commence until the tortious conduct is abated. Romaguera v. Overby, 97-1654, p. 3 (La. App. 4 Cir. 3/4/98), --- So. 2d ---. To allege a continuing tort, a plaintiff must allege continuous action and continuous damage. Id. The defendants' alleged malpractice occurred when the

breast tissue was removed in 1985. There was no continuous act that perpetuated Crystal's injury.

This case is distinguishable from Winder v. Avet, 613 So. 2d 199 (La. App. 1st Cir. 1992), writs den. 617 So. 2d 907 (La. 1993), cited by the Browns. In Winder the defendant doctor misdiagnosed the patient's condition as cancer. Following the misdiagnosis the patient and defendant were in continual contact, and the patient was continuously treated for cancer that he did not have. He died of complications from the treatment.

The Browns also rely upon Justice Lemmon's dissent in Whitnell v. Silverman, 95-0112, 95-0259 (La. 12/6/96), 686 So. 2d 23, 32-35, which considered application of the third category of *contra non valentem* to a malpractice case. *Contra non valentem* applies to interrupt or suspend prescription in four general situations, the third of which is:

> The debtor himself has done some act effectually to prevent the creditor from availing himself of his cause of action.

The Supreme Court has examined the application of that exception to a medical malpractice claim but has not "expressly and directly declared that the third category of *contra non valentem* applies to medical malpractice cases." Fontenot v. ABC Insurance Co., 95-1707, p. 5 (La. 6/7/96), 674 So. 2d 960, 963; Claim of Aron, 96-2665, p. 4 (La. App. 4 Cir. 5/21/97), 695 So. 2d 553, 556-557, *citing* Rajnowski v. St. Patrick's Hospital, 564 So. 2d 671 (La. 1990). However, the Supreme Court has stated that a physician's conduct must rise to the level of concealment, misrepresentation, fraud, or ill practices under that exception. Fontenot v. ABC Insurance Co., 674 So. 2d 960, 963; Claim of Aron, 695 So. 2d at 557.

The Browns did not allege concealment, misrepresentation, fraud, or ill practice. Even assuming the third category of *contra non valentem* may be invoked in a

malpractice case, there was no allegation or showing that it applies to this case.

Constitutionality of La. R.S. 9:5628

The Browns argue they are entitled to an evidentiary hearing and ruling from the trial court on whether La. R.S. 9:5628 is unconstitutional as applied to Crystal. *See* Sibley v. Board of Supervisors of Louisiana State University, 477 So. 2d 1094, 1109-1110 (La. 1985). They claim the statute unreasonably discriminates against Crystal on the basis of her physical condition. They submit that because Crystal could not have known of the damage before she reached puberty and her breasts developed, her condition had a latency period greater than the three year limitation of §5628. The Browns urge this Court to remand for an evidentiary hearing. Defendants respond that a remand is not warranted because the Supreme Court has upheld the constitutionality of the statue.

In Crier v. Whitecloud, 496 So. 2d 305 (La. 1986), the plaintiff's injury occurred more than three years after her medical treatment. In 1978 a rod was surgically implanted in her back to correct scoliosis. In 1982 the rod broke. The plaintiff filed suit within one year of that discovery. In response to the doctor's exception of the prescription, plaintiff claimed the three year limitation in La. R.S. 9:5628 violated her rights to due process and equal protection. The Supreme Court held that §5628 equally affects all persons who undergo medical treatment and does not discriminate against one class of individuals based on physical condition. Crier, 496 So. 2d at 311. Because the classification of which plaintiff complained was outside the scope of La. Const. Art. 1, § 3, which prohibits discrimination based on physical condition, plaintiff had to show that the statute did not further an appropriate state interest. Id. The plaintiff offered no evidence to show that R.S. 9:5628 did not further an appropriate state interest and that the statue was not

rationally related to a reasonable state interest. Moreover, the Court held that a remand "would serve no useful purpose." Crier, 496 So. 2d at 311.

Three justices dissented, two because they would have remanded for a hearing. Justice Dennis would have remanded, but he agreed that La. R.S. 9:5628 did not discriminate based on physical condition:

> (T)he constitutional safeguard was designed to protect against invidious discrimination between individuals based on classifications according to the nature of their physical conditions rather than according to the temporal development of their physical damage or conditions.

Crier, 496 So. 2d at 314 (Justice Dennis dissenting).

This Court sharply criticized Crier in Whitnell v. Silverman, 93-2468, 94-0343 pp. 5-6 (La. App. 4 Cir. 11/4/94), 646 So. 2d 989. In Whitnell, the plaintiff's disease had a latency period less than three years but plaintiff filed suit more than three years after the alleged malpractice. This

Court held La. R.S. 9:5628 "is unconstitutional both as to latency periods greater than and less than three years." Id. At 993. This Court distinguished Crier because "the evidence that was so sorely lacking in the Crier record is part of the instant record as a result of the Sibley hearing ...." Whitnell, 646 So. 2d at 994.

The Supreme Court reversed. Whitnell v. Silverman, 95-0112, 95-0259 (La. 12/6/96), 686 So. 2d 23. The Court held that the plaintiff had no standing to challenge the constitutionality of La. R.S. 9:5628 in its application to persons whose diseases had latency periods over three years and that this Court erred by deciding that issue. Whitnell, 686 So. 2d at 29. The Supreme Court further upheld the constitutionality of the statute as it applied to the plaintiff. Whitnell, 686 So. 2d at 30.

The Supreme Court in Whitnell specifically declined to address "the constitutionality of La. R.S. 9:5628 as it

applies to individuals with diseases that have latency periods in excess of three years" because that issue was not before the Court. Whitnell, 686 So. 2d at 29, n. 13. That suggested the Court might reconsider Crier were the issue before it. Reinforcing that suggestion, Justice Lemmon stated in his dissent: "A case with a lengthy latency period might call for our reexamination of the Crier decision on the constitutionality of Section 5628." Whitnell, 686 So. 2d at 33 n. 5 (Justice Lemmon dissenting). Nonetheless, Whitnell "disagree[d] with the court of appeal's finding that Crier should be overruled." Whitnell, 686 So. 2d at 28. That reaffirmed Crier.

The consequence of Crystal's surgery did not physically manifest until she reached puberty more than eight years after removal of her breast tissue. Suit was filed nearly nine years after the alleged malpractice. Crier dictates that the Browns' claim be dismissed under La. R.S. 9:5628. *See*

also Martini v. Louisiana State University Medical Center - Shreveport, 28, 167 (La. App. 2 Cir. 1/22/97), 688 So. 2d 642, which dismissed a malpractice claim by the plaintiff who did not discover a damaged fallopian tube until she attempted to become pregnant six and a half years after the alleged malpractice.

We pretermit the remaining issues. The judgment is affirmed.

AFFIRMED